YEE HUA HOLDINGS SDN BHD & ANOR

v.

CHIN YEW NAM & ORS

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[CIVIL SUIT NO: 23-430-1986]
30 JANUARY 1999

CIVIL PROCEDURE: *Costs - Security for costs - Plaintiff a limited company - Delay in application for security of costs - Whether defendant should have investigated plaintiff's accounts to identify their financial position - Whether delay inordinate - Whether delay will prejudice plaintiff - Whether s. 351 Companies Act 1965 serves as notice in law of possibility of application for security for costs - Whether s. 351 excuses delay in applying for security for costs - Whether application ought to be made promptly*

CIVIL PROCEDURE: *Costs - Security for costs - Plaintiff a limited company - Whether security for costs must be ordered if shown that plaintiff will be unable to pay costs - Whether court still has discretion - What issues ought to be considered by court - Companies Act 1965, s. 351*

CIVIL PROCEDURE: *Costs - Security for costs - Plaintiff a limited company - Whether order of security would stifle valid claim - What must plaintiff company show to succeed in convincing court that order of security for costs would stifle their claim*

The plaintiffs were registered companies which had agreed to buy a piece of land from the defendants and further to this, a certain sum of money was paid to the defendants. When the balance of the purchase price became due, the plaintiffs asked for and was granted an extension of 12 months to pay the same. Upon the expiry of the extension period, however, the plaintiffs were still unable to pay the balance owing. The defendants treated this as a breach of the sale agreement and thus forfeited all sums already paid to them. The plaintiffs, contending that the breach of the sale agreement was actually due to the failure of the defendants to obtain the sanction of the High Court within the stipulated time, commenced an action against the defendants sometime in 1986 claiming a refund of the monies paid. In 1997, the said action came up for hearing and during the trial, when it became apparent that the plaintiffs were hopelessly impecunious, the defendants orally applied for security for costs pursuant to s. 351 of the Companies Act 1965 ('the Act'). As the trial judge was not prepared to consider an oral application, the defendants dropped the issue at that stage. Subsequently, in 1998, the defendants filed an application for security for costs and this was allowed by the Deputy Registrar. The plaintiffs appealed against this decision of the Deputy Registrar.

The plaintiffs' grounds of appeal were (i) that the defendants have been guilty of inordinate delay in making the application for security for costs; (ii) that their impecunious position has been brought about by the defendants; and (iii) that the application for security is being used to stifle a *bona fide* claim.

Against the plaintiffs' assertion that the application for security for costs was unjustifiably delayed, the defendants argued that although the action was filed in 1986, it was only in the midst of the trial in 1997 that credible testimony about the plaintiffs' impecuniosity surfaced. Further, the defendants submitted that even if there is inordinate delay, this would not be a bar to security being ordered because the plaintiffs have not suffered any prejudice by the delay as they should have been put on notice in law by s. 351 of the Act of the possibility of having to provide security.

Held:

[1] A reading of s. 351 of the Act indicates that even if it is shown that a plaintiff will be unable to pay the costs of a defendant, the court retains a discretion whether or not to order an impecunious plaintiff to provide security for costs.

[2] The plaintiffs' contention that they are presently impecunious because the defendants refuse to refund the sums forfeited is not a complaint that is validly made at this stage of the proceedings because the right to such a refund has not yet been established.

[3] As regards the plaintiffs' claim that the defendants are attempting to stifle a genuine *bona fide* claim which has good prospects of success, apart from saying that the plaintiffs' claim is genuinely brought and does have prospect of success, the court does not find it appropriate to go into the merits of either the claim or the defence as it has not been clearly demonstrated that there is a high degree of probability of success or failure of either.

[3a] In raising the complaint that the ordering of security would stifle their claim, the plaintiffs refer to their own financial inability only and have not made any reference to those who stand behind the plaintiffs or any of its directors or shareholders and whether or not they would be able to provide the security ordered. In failing to do so, the plaintiffs have not discharged the onus on them of showing that the order for security would indeed stifle their claim.

[4] It was within the defendants' powers to investigate the financial position

of the plaintiffs who enjoy corporate status and whose records are accessible to the public for inspection. The defendants did not say whether any and if so what earlier attempts were made to establish credible testimony regarding the impecunious position of the plaintiffs. Not having done so, it is not open to the defendants to now say that it was only when cross-examination took place that credible testimony became available.

[5] Having been made aware of the plaintiffs' impecuniosity, and having seen fit to make an oral application for security during the proceedings, it took the defendants almost another year before this application was filed. Such a period of delay is regarded as inordinate.

[6] To say that a delay in the application for security will not prejudice a plaintiff which is a limited company as they should have been put on notice by s. 351 of the Act would lead to the unacceptable result that however unjustifiably late in the day an application for security is made, such lateness will stand to be excused by the fact that s. 351 of the Act constitutes notice in law of the possibility that such an application will be made.

[6a] In answer to an accusation that a claim would be inhibited or stifled by an order for costs, it would be right to argue that an impecunious company proceeding to litigation should anticipate having to provide security because of s. 351 of the Act. This same argument when deployed to excuse delay, loses its force for the reason that a person guilty of inordinate delay cannot hope to be excused for such delay by praying in aid a provision of law.

[7] An application for security should be made as promptly as possible. The defendants' failure to come to court promptly deprived the plaintiffs of the opportunity to asses their position in relation to security before the plaintiffs embarked to any real extent on this litigation and thereby incurring costs and expenses themselves. To this extent, the plaintiffs have suffered prejudice.

[Appeal allowed; order for security set aside.]

Cases referred to:

Adarsh Pandit v. Viking Engineering Sdn Bhd [1998] 2 AMR 1009 ***(dist)***
Buckley v. Bannell Design & Construction Pty Ltd [1974] 1 ACCR 301 ***(refd)***
Gula Perak Bhd v. Agri-Project (M) Sdn Bhd [1989] 1 MLJ 422 ***(refd)***
Keary Development Ltd v. Tarmac Construction Ltd & Anor [1995] 3 All ER 534 ***(foll)***
Porzelack KG v. Porzelack (UK) Ltd [1987] 1 All ER 1074 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 351

Other sources referred to:
Halsbury's Laws of England, 4th edn, vol 37, para 305
Mallal's Supreme Court Practice, 2nd edn, para 23.2.5, p 291

For the plaintiff - VS Viswanathan; M/s TS Su & Co
For the defendant - S Jeya Palan; M/s Maxwell, Kenion, Cowdy & Jones

Reported by S Dharmendran

JUDGMENT

Clement Skinner JC:

This is an appeal against the decision of the deputy registrar, who on 9 October 1998, ordered the appellants (hereafter the plaintiffs) to provide security for costs in the sum of RM20,000 in respect of the respondent's (hereafter the defendants) future costs, such security to be paid within 60 days of the order. Pending payment the action was ordered to be stayed.

The plaintiffs being limited companies, the defendants' application for security was made pursuant to s. 351 of the Companies Act 1965 which reads:

> 351 Where a limited company is plaintiff in any action or other legal proceedings, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

The brief facts of the case are these. The six defendants are owners of a piece of land (the said land) in Ipoh township which they sold to the plaintiffs for RM2.4 million on 9 February 1983 and for which a sale and purchase agreement (the sale agreement) has been entered into. By 18 March 1986 when the defendants gave notice to the plaintiffs that the sale agreement was being terminated for alleged breach by the plaintiffs and all sums paid thereunder forfeited, the plaintiffs had by then paid some RM600,000 to the defendants towards the purchase price and a further RM90,000 by way of interest for obtaining an extension of time to settle the balance of the purchase price.

It is the plaintiffs' case that they are entitled to a refund of this RM690,000 as it is the defendants who are in fundamental breach of the sale agreement, in that, the 2nd and 3rd defendants who are the administrators of the estate of one Yik Fook Heng, deceased, a co-owner of the said land, had undertaken to obtain the sanction of the High Court to the sale agreement on or before 8 August 1983, failing which by cl. 2 thereof, the sale agreement would become

void and all monies paid by the plaintiffs refunded without compensation or costs. In the event, as the sanction of court was obtained on 5 September 1983 only, the plaintiffs say the sale agreement has became void, and the RM690,000 refundable.

Before dealing with the merits of the application, I set out what I have found to be either indisputable or undenied facts relevant to the application.

The plaintiffs commenced this action on 14 October 1986 and pleadings closed on 26 October 1988. Some nine years later on 26 August 1997, the action came on for hearing. During cross-examination of plaintiffs' witness Mr. Peter Chin Yan Oon on 12 September 1997, it became apparent that the plaintiffs were hopelessly impecunious. On that same day, learned counsel for the defendants made an oral application to the learned judge for security for costs but he was not prepared to consider an oral application so the defendants did not persist with their application. On 12 September 1997 the plaintiffs closed their case after having called two witnesses. The case was then adjourned to 20 October 1997. In the meantime, the learned judge was transferred to Kuala Lumpur. Both parties have made representation for the learned judge to complete this case but have been officially informed that this suit should be heard by the judge assuming duties in Court 4, Ipoh. On 7 August 1998 solicitors for the defendants wrote to solicitors for the plaintiff requesting for security for costs which was refused. On 8 September 1998 the defendants filed this application.

The plaintiffs do not deny that they are hopelessly impecunious. The defendants therefore bring themselves within the provisions of s. 351 Companies Act in applying for security for costs. A reading of s. 351 indicates however, that notwithstanding it is shown that a plaintiff will be unable to pay the costs of a defendant, the court retains a discretion whether or not to order an impecunious plaintiff to provide security for costs.

Useful reference may be made to the case of *Keary Development Ltd. v. Tarmac Construction Ltd. & Anor* [1995] 3 All ER 534, for the matters a court may properly take into account in the exercise of that discretion. At p. 539, Peter Gibson LJ states:

> As was established by this Court in *Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd.* [1973] All ER 609, the court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances ... The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim ...

The plaintiffs oppose the application for security on several grounds. They complain that the defendants have been guilty of inordinate delay in making the application; that their impecunious position has been brought about by the defendants and that the application for security is being used to stifle a *bona fid*e claim. I shall deal with each of these complaints but for convenience will take the latter two first.

The plaintiffs accuse the defendants of being the author of their misfortune and of taking advantage of that misfortune to obtain security.

The alleged misfortune of the plaintiffs must be looked at in its proper context. It is not disputed that the plaintiffs did not pay the balance of the purchase price of RM1.8 million when it became due and in fact asked for and was granted an extension of 12 months to pay the same. By March 1986 when the extension period had expired and the RM1.8 million still remained unpaid, the defendants enforced their rights under the sale agreement. I cannot see how the inability of plaintiffs to pay the RM1.8 million was caused by the failure of the defendants to obtain court sanction by 8 August 1983. To me the inability to pay must have resulted from the plaintiffs' inability to raise funds from its own resources or from external sources and not as a consequence of the court sanction not being obtained on due date. As regards the plaintiffs' contention that they are presently impecunious because the defendants refuse to refund the RM690,000 forfeited, I do not regard such complaint as validly made at this stage of the proceedings because the right to such a refund has not yet been established. I therefore find no merit in this complaint.

As regards the plaintiffs' claim that the defendants are attempting to stifle a genuine *bona fide* claim which has good prospects of success, apart from saying that the plaintiffs' claim is genuinely brought and does have prospect of success, I do not find it appropriate to go into the merits of either the claim or the defence as it has not been clearly demonstrated that there is a high degree of probability of success or failure of either (see *Porzelack KG v. Porzelack (UK) Ltd.* [1987] 1 All ER 1074).

The plaintiffs complain that the ordering of security would stifle their claim because they would not be able to come up with the sum ordered as they are now hopelessly impecunious. In raising this complaint the plaintiffs refer to their own financial inability only and have not made any reference to those who stand behind the plaintiffs or any of its directors or shareholders and whether or not they would be able to provide the security ordered. In failing to do so, the plaintiffs have not discharged the onus on them of showing that the order for security would indeed stifle their claim.

In *Keary Development Ltd v. Tarmac Construction Ltd & Anor (supra)* Peter Gibson LJ expressed his view on this aspect of ordering security in the following words at p. 540:

> Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can be properly inferred without direct evidence (see *Trident International Freight Services Ltd. v. Manchester Ship Canal Co.* [1990] BCLC (263) ... However, the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation (see *Flender Werft AG v. Aegean Maritime Ltd.* [1990] 2 (Llyod's Report 27).

I must therefore reject this complaint of the plaintiffs.

Finally, the point on inordinate delay. The plaintiffs complain that there are two periods of delay: (i) a period of some ten years between the pleadings being closed in 1988 and when this suit first came up for trial on 12 September 1997 on which date learned counsel for the defendants first indicated security was being sought. And (ii) from the time the defendants learned of the impecunosity of the plaintiffs during the trial, to the actual filing of this application for security on 8 September 1998, when there was a further delay of almost one year in making the application.

In considering the question of delay in the context of an application for security for costs, I again find that useful reference may be had to the judgment of Peter Gibson LJ in *Keary Development Ltd. v. Tarmac Construction Ltd. & Anor (supra)* where at p. 542 he states:

> The lateness of the application for security is a circumstance which can properly be taken into account (see *The Supreme Court Practice* 1993 Vol. 1, para 23/1-3/28). But what weight, if any, this factor should have and in which direction it should weigh must depend upon matters such as whether blame for the lateness of application is to be placed at the door of the defendant or at that of the plaintiff. It is proper to take into account the fact that costs have already been incurred by the plaintiff without there being an order for security. Nevertheless, it is appropriate for the court to have regard, to what may yet be incurred.

On delay, the learned deputy registrar found that the defendants' application for security was made at a late stage but nevertheless accepted the explanation that the defendants did not know of the impecuniosity of the plaintiff until cross-examination of plaintiffs' witness on 12 September 1997.

Learned counsel for the defendants submits that even though this appeal is by way of actual rehearing before me, the finding of the deputy registrar should be given the weight it deserves as he had delivered reasons for his decision. I have considered carefully the decision of the learned deputy registrar and find that he did not look at and weigh the factor of lateness either in the manner suggested in the case of *Keary Development Ltd*, above quoted, or in any other manner. I also find that unfortunately the learned deputy registrar did not give any reasons why he found the explanation acceptable to excuse the late application. In these circumstances, I regret I cannot give to the finding of the deputy registrar the weight that learned counsel for the defendants urges me to give it.

In this case, there are two periods of delay. The first period of ten years can only be described as extreme. The defendants have sought to explain it away by saying that although the action was filed in 1986, it was only on 12 September 1997, in the midst of cross-examination of the plaintiffs' director and moving force, Mr. Peter Chin Yan Oon that credible testimony became available to enable an application to be made. I do not find this an acceptable explanation. As pointed out by counsel for the plaintiffs, during the first period of delay, it was within the defendants' powers to investigate the financial position of the plaintiffs who enjoy corporate status and whose records are accessible to the public for inspection. The defendants have not said whether any and if so what earlier attempts were made to establish credible testimony regarding the inpecunious position of the plaintiffs. Not having done so, it is not open to the defendants to now say that it was only when cross-examination took place that credible testimony became available.

In respect to the second period of delay, I find that the defendants have in fact offered no explanation at all. Having been made aware of the plaintiffs' inpecunosity, and having seen fit to make an oral application for security during the proceedings, it took the defendants another eleven months before this application was filed. I regard such a period of delay as inordinate. Not a word has been said why it took about eleven months to make this application. In fact it is to be noted that in respect of both periods of delay, the defendants do not say that the plaintiffs have in any way been responsible for or contributed towards them.

The defendants also seek to justify the lateness of their application by submitting that in law, an application for security for costs can be made at any stage of the proceedings and refers to *Mallal's Supreme Court Practice* 2nd Edn. p. 291 para 23.2.5 where the following passage appears:

> Time for making the application: The application may be made at any stage of the proceedings and the defendant's right to security for costs is not waived by service of the defence.

Counsel for the defendants also seeks reliance on the case of *Adarsh Pandit v. Viking Engineering Sdn. Bhd.* [1998] 2 AMR 1009 where it is stated that:

> an application for security for costs may be applied for at any time and not merely at the earliest opportunity.

A reading of *Adarsh Pandit's* case will show that what was really complained of in that case was the tardiness or delay of the defendant in having the application for security heard. The defendant there explained, and it was accepted by the learned Judicial Commissioner, that the defendant had in fact applied for security for costs in 1988 (the suit was also filed in 1988), but intervening events such as an O. 14 application and a winding-up petition, prevented the application for security being heard earlier. There was therefore an acceptable explanation for the delay. The statement of the learned Judicial Commissioner above quoted must therefore be seen as made in the context of the application for security being filed in the same year as the suit was commenced. The same circumstances do not obtain in our case.

For myself, I hold the view that an application for security should be made as promptly as possible and respectfully prefer the commentary referred to by learned counsel for the plaintiffs in *Halsbury's Laws of England,* 4 Edn. Vol. 37 para 305 as expressing the fuller and more accurate position in law as to when an application for security for costs may be made. The commentary reads:

> although an application for security for costs may be made at any stage of the proceedings, it should be made as promptly as possible and it should not be made too late or too close to the trial since unless there is reasonable explanation to the delay it may be refused.

Having found that there has been inordinate delay on the part of the defendants in making this application, I need to consider what weight I should give this factor and in which direction it should weigh.

The defendants believe it should not weigh against them as it is their submission that even if there is inordinate delay, this would not be a bar to security being ordered because the plaintiffs have not suffered any prejudice by the delay as they should have been put on notice in law by s. 351 Companies Act 1965 of the possibility of having to provide security and therefore budgeted for it. And in any event, as the application is for security for future costs as opposed to costs already incurred, what possible prejudice could the plaintiffs complain of by an inordinately late application.

I am afraid I do not agree with the above arguments. To do so would lead to the unacceptable result that however unjustifiably late in the day an application for security is made, such lateness will stand to be excused by the fact that s. 351 Companies Act constitutes notice in law of the possibility that such an application will be made.

It has not escaped my attention that the defendants' argument that s. 351 Companies Act should serve as a warning to the plaintiffs draws its support from the case of *Gula Perak Bhd. v. Agri-Project (M) Sdn. Bhd.* [1989] 1 MLJ p. 422 where at p. 426, V.C. George J (as he then was) stated that:

> Knowing that there is that s. 351 statutory exception to the general rule, generally speaking any impecunious company that proceeds to litigation should do so in the knowledge and anticipation that it can be required to provide the s. 351 security.

A reading of the *Gula Perak* case will show that the above quoted passage of the learned judge was made in the context of whether an order for costs would inhibit or prevent the petitioner from proceeding with the petition. In other words, to an accusation that a claim would be inhibited or stifled by an order for costs, it would be an answer to such accusation that an impecunious company proceeding to litigation should anticipate having to provide security because of s. 351. In my view, that same argument when deployed to excuse delay, as now done in our case, loses its force for the reason I have already stated above, that is, a person guilty of inordinate delay cannot hope to be excused for such delay by praying in aid a provision of law.

In answer to the defendants' assertion that the plaintiffs could not have suffered any prejudice by the delay, learned counsel for the plaintiffs states that between 1986 and 1997, the plaintiffs have been represented by solicitors and counsel. Legal costs have been paid. Secondly, from September 1997 until August 1998, further fees have been incurred by the plaintiff by way of additional legal costs to its own solicitors. To that extent, the plaintiffs have suffered prejudice. I have no hesitation in accepting what is stated by counsel for the plaintiffs as the payment of such costs is a matter that can properly be inferred. I would here refer to the case of *Buckley v. Bannell Design and Construction Pty. Ltd.* [1974] 1 ACCR 301 and to the reasons there stated by Moffitt, P., as to why an application for security should be made promptly. At p. 309 it is stated:

> The primary reason why the application should be brought promptly and pressed to determination promptly is that the company, which by assumption has financial problems, is entitled to know its position in relation to security at the outset and before it embarks to any real extent on its litigation, and certainly before it is allowed to or commits substantial sums of money towards litigating its claim.

I am aware that Moffitt P., was speaking in a context factually different from ours, but I respectfully agree with the reasons given by him why an application for security should be made promptly.

To me, the defendants' failure to come to court promptly has deprived the plaintiffs of the opportunity to assess their position in relation to security before the plaintiffs embarked to any real extent on this litigation and thereby incurring themselves in costs and expenses. As opposed to the position suffered by the plaintiffs, the defendants say their application is for future costs which in fact relates to the presentation of their own case for which the defendants have given no breakdown or estimate to account for the sum of RM50,000 claimed. If the defendants say this is the amount of their future costs, I cannot ignore the fact that the plaintiffs, who have already closed their case, will have very little choice but to continue the fight and continue to incur and bear future costs too. And if the amount claimed by the defendants is anything to go by, the plaintiffs can expect to look at bearing alike amount.

In the result, having regard to all the circumstances, including the stage at which this case has now reached; that though the defendants cannot be said to have behaved oppressively by trying to stifle the plaintiffs' claim, there has been extreme and inordinate delay on the part of the defendants in seeking security; that the plaintiffs are blameless for the delay; that the plaintiffs have already incurred themselves in costs without having to contend with an order for security; that the plaintiffs will continue to bear and incur future costs too; that the defendants seek security for future costs which until recently they were not too concerned with otherwise they would have acted promptly, in my judgment greater injustice would be caused to the plaintiffs by the making of an order for security than to the defendants by the refusal of it. I accordingly allow this appeal with costs and set aside the order for security made.

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